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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

CHARLES RIVER CIVIC TELEVISION, INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, GREATER BOSTON TELEVISION CORPORATION, GREATER BOSTON TV CO., INC., BOSTON BROADCASTERS, INC., WHDH, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Charles River Civic Television, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on November 13, 1970.

OPINIONS BELOW

The opinion of the court below has not yet been reported. This opinion is found at pp. 1a-43a of the appendices filed with this Court by WHDH, Inc. in

No. 1622–October Term 1970 ("WHDH Appendices") in connection with its petition seeking a writ of certiorari filed April 23, 1971.[1] The opinion of the court below denying WHDH, Inc.'s motion requesting that the proceedings be remanded to the Commission (WHDH Appendices, Appendix H) also has not yet been reported.

FCC Decisions: The FCC decisions which were the subject of review by the court below consist of a decision of the Commission adopted January 22, 1969 reported at 16 FCC 2d 1 (WHDH Appendices, pp. 52a-79a) and a decision of the Commission denying reconsideration of that opinion reported at 17 FCC 2d 856 (1969) (WHDH Appendices, pp. 306a-325a). The Initial Decision of the Hearing Examiner is reported at 16 FCC 2d 29 (1966) (WHDH Appendices, pp. 80a-305a).

JURISDICTION

The judgment of the court below (WHDH Appendices at 44a) was entered on November 13, 1970. Petitions for rehearing filed by various parties to the proceedings below were denied on February 16, 1971 (WHDH Appendices, pp. 44a-46a). A motion to remand the case to the Commission filed by WHDH, Inc. on the basis of newly discovered evidence was denied on April 15, 1971 (WHDH Appendices, Appendix H). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) and 47 U.S.C. § 402(j).

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[1] The WHDH Appendices consist of appendices lettered A-G which are consecutively paginated and are bound separately from WHDH, Inc.'s petition and Appendix H which is bound with WHDH, Inc.'s petition.

QUESTIONS PRESENTED

1. Whether the court below erred in holding that a decision of the FCC choosing between two competing applicants for a commercial television facility was legally valid where only three of seven Commissioners participated in and voted upon the choice between the applicants and only two of the Commissioners participating and voting provided a rationale for their choice.

2. Whether the court below erred in affirming the FCC's choice between two competing applicants for a commercial television facility where that choice was largely based upon the preferred applicant's representations concerning the extent to which its ownership would be integrated with management whereas the facts in the record clearly showed that the preferred applicant's representations could not be relied upon.

STATUTES AND FCC RULES INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended (47 U.S.C. §§ 151 *et seq.*), of the Administrative Procedure Act, as amended (5 U.S.C. §§ 551 *et seq.*) and of the Rules and Regulations of the Federal Communications Commission are set forth in the Supplemental Appendix hereto, *infra.*

STATEMENT

This case involves applications for authority to operate a commercial VHF television broadcasting station on Channel 5 in Boston, Massachusetts. The history of this proceeding covers a span of 17 years and is quite complex. The present phase of the proceeding, culminating in the decision for which review is sought

in this petition, began in 1963 when the Commission designated for comparative hearing the renewal application of WHDH, Inc. ("WHDH"), the then operator of the facility, and the applications for the same facilities filed by Charles River Civic Television, Inc. ("Charles River"), Boston Broadcasters, Inc. ("BBI") and Greater Boston TV Co., Inc. ("Greater Boston II").[2] In order to place the present phase of the proceedings in perspective, however, it is necessary to understand the background of the case.

I. BACKGROUND

In an earlier phase of the proceeding, begun in 1954, involving WHDH and other applicants for initial authority to operate on Channel 5, the Commission awarded the grant to WHDH. Upon appeal, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Commission for further hearings on alleged *ex parte* contacts made by Robert B. Choate, a principal of WHDH. *Massachusetts Bay Telecasters, Inc.* v. *FCC,* 104 U.S. App. D.C. 226, 261 F.2d 55 (1958). The court of appeals retained jurisdiction. After a hearing, the Commission found that *ex parte* contacts had indeed occurred, and upon the Commission's request, the court of appeals remanded the entire proceeding to the Commission to permit a new evaluation of all the applicants. *Massachusetts Bay Telecasters, Inc.* v. *FCC,* 111 U.S. App. D.C. 144, 295 F.2d 131, *cert. den.,* 366 U.S. 918

[2] Greater Boston II is, in essence, the alter-ego of Greater Boston Television Corporation, an applicant which competed with WHDH for an initial license in an earlier phase of the proceeding, with the majority of the stock in Greater Boston II being owned by persons who hold a majority of the stock in Greater Boston Television Corporation.

(1961). Upon reevaluation, the Commission reaffirmed its 1957 grant to WHDH, but limited WHDH to a four-month license. *WHDH, Inc., et al.,* 33 FCC 449.

Both WHDH and a competing applicant again appealed from this decision, but before any final decision could be rendered by the court of appeals, Mr. Choate died and the court remanded the case to the Commission to permit a reevaluation of the applicants in light of this change in circumstances. *Greater Boston Television Corp.* v. *FCC,* 118 U.S. App. D.C. 162, 334 F.2d 552 (1964). In the interim, the Commission had issued an order permitting new applicants to file for Channel 5. *WHDH, Inc., et al.,* 25 Pike & Fischer, R.R. 80 (1962). Charles River, BBI and Greater Boston II filed applications in competition with the pending renewal application of WHDH. In response to the court of appeal's remand in *Greater Boston Television Corp., supra,* the Commission consolidated the proceedings in the original case with those in the second proceeding, in which WHDH's renewal application was to compete with the initial applications of Charles River, BBI and Greater Boston II, but only for the narrow purpose of considering the effect of Mr. Choate's death on the WHDH application.

II. THE PRESENT PHASE OF THE PROCEEDING

The Hearing Examiner's Initial Decision in the consolidated proceeding was issued in 1966 after a comparative hearing. *WHDH, Inc., et al.,* 16 FCC 2d 29 (1966) (WHDH Appendices, pp. 80a-305a). The Examiner proposed a full three-year renewal for WHDH and denial of the competing applications. On January 22, 1969, the Commission adopted a decision

accepting most of the Examiner's findings of fact, but reversing his ultimate determination and granting the application of BBI. 16 FCC 2d 1 (1969) (WHDH Appendices, pp. 52a-79a). In a Memorandum Opinion and Order of May 19, 1969, 17 FCC 2d 856 (1969) (WHDH Appendices, pp. 306a-325a), the Commission denied reconsideration of the January, 1969 decision.

The Commission's decision of January, 1969 awarding a construction permit to BBI and denying the competing applications is relatively brief and relies primarily on an analysis of the applicant's showing under the standard comparative criteria. The criteria are delineated in the Commission's *Policy Statement on Comparative Broadcast Hearings* ("Policy Statement"), 1 FCC 2d 393 (1965) (WHDH Appendices, pp. 373a-382a).

The following is a brief summary of the Commission's decision.

a. Past Broadcast Record

None of the applicants was awarded a preference for past broadcast record. The Commission declined to award WHDH any preference on the basis of its past record, finding that record to be only average and accordingly not entitled to any weight under the *Policy Statement.* Apart from WHDH, Charles River was the only other applicant with a past broadcast record. Theodore Jones, Charles River's president and a director and stockholder, is also the president, a director and majority stockholder of Charles River Broadcasting Co., Inc., the licensee of WCRB-AM and FM, in Waltham, Massachusetts, a suburb of Boston. Although the Commission adopted the Ex-

aminer's findings that WCRB's record in its specialty was "excellent", the Commission found that Mr. Jones' past broadcast record was not sufficiently unusual to merit consideration in the evaluation of the applicants. 16 FCC 2d at 11 (WHDH Appendices at 62a).

b. Diversity of Ownership of Mass Communications Media

The Commission assessed a substantial comparative demerit against WHDH in view of its ties to the Boston Herald-Travel Corp. which publishes two daily newspapers and a Sunday newspaper in Boston, owns an AM and FM station in Boston and has links to certain CATV facilities. Because of Charles River's ties through Mr. Jones to WCRB, the Commission found that BBI, with no ties to local mass media, was entitled to a slight preference over Charles River, even though Charles River's local interests were "trivial by comparison" with WHDH. 16 FCC 2d at 13 (WHDH Appendices at 64a).

c. Integration of Ownership and Management

The Commission concluded that BBI and Charles River were substantially superior to WHDH in the area of integration of ownership with management. The Commission also determined that as between BBI and Charles River, BBI merited a "significant preference." Although finding that BBI and Charles River were indistinguishable in the matter of broadcast experience and local residence (both being qualitative factors bearing on the integration criterion), the Commission noted that the critically important distinction was the degree to which individuals with ownership interests would play a distinguishable role in the day-to-day operation of the proposed station. Charles

River was given credit for the full-time integration of Mr. Jones as general manager of the proposed station. BBI was preferred on the integration factor, however, because six of its stockholders proposed to work full-time at the station. BBI was also found to be qualitatively superior to Charles River because of the background and experience of its integrated principals. The Commission found further that neither Charles River nor BBI should receive more than slight credit for the proposed integration of owners on a part-time basis. 16 FCC 2d at 13-14 (WHDH Appendices at 64a-65a).

d. Program Proposals

Although slight demerits were assessed against both Charles River and BBI in the area of their programming proposals, the Commission's ultimate conclusion on this aspect of the comparison was that none of the applicants merited a preference over the others for program service. The Commission found that both Charles River and BBI had presented acceptable programming proposals and that neither proposal was so superior to the other as to warrant a preference. Charles River's slight demerit arose from the fact that the Charles River Civic Foundation, a tax-exempt charitable organization, would eventually own all of the stock of Charles River and that restrictions imposed by the Internal Revenue Code would bar Charles River from editorializing on legislative matters. BBI's demerit was based on its proposal to devote 36.3% of its scheduled program time to local live programs, as compared with Charles River's 28.5% proposal and WHDH's past performance of 22%. The Commission concluded, as had the Examiner, that since BBI had been unable to substantiate the feasibility of presenting

such an unusually high percentage of local programming, BBI should receive a slight demerit since the "suspicion arises that BBI's percentage figure 'was flashed for its supposed value in comparison.'" 16 FCC 2d at 16 (WHDH Appendices at 67a). However, this suspicion was in effect segregated from an evaluation of the BBI program proposal itself and accorded limited weight.

e. Other Factors

Finally, the Commission assessed a demerit against WHDH for its failure to file an application for consent to transfer of control upon the *seriatim* accession to the presidency of the Boston Herald-Traveler Corp. of certain individuals. 16 FCC 2d at 17-19 (WHDH Appendices at 68a-70a). Greater Boston II was excluded from the comparative evaluation for its failure to meet certain preliminary disqualifying issues. 16 FCC 2d at 7 (WHDH Appendices at 58a).

In sum, because it had found BBI to be superior to the other applicants on the diversification and integration criteria, the Commission concluded that the public interest would best be served by a grant of its application. Two Commissioners voted for the grant to BBI (Wadsworth and Bartley), and one (Johnson) concurred in the denial of WHDH's renewal application and the grant to BBI, expressing no preference as between Charles River and BBI. Chairman Hyde abstained from voting, Commissioner Cox did not participate and Commissioner H. Rex Lee was absent. Commissioner Robert E. Lee dissented to the denial of WHDH's renewal application.

Each of the parties filed a petition for reconsideration, alleging error in various aspects of the Commis-

sion's decision. In a Memorandum Opinion and Order released on May 19, 1969, *WHDH, Inc., et al.*, 17 FCC 2d 856 (WHDH Appendices, pp. 306a-324a), the Commission denied in all substantial respects these petitions and reaffirmed its original determination.

III. ACTION OF THE COURT BELOW

Charles River, WHDH and Greater Boston II each appealed the Commission's grant to BBI to the court below. In its appeal, Charles River argued that the grant to BBI was invalid since only three of seven Commissioners had participated in and voted upon the choice between Charles River and BBI and since only two Commissioners provided a rationale for their selection of BBI instead of Charles River. In addition, Charles River argued that the Commission erred in basing its grant to BBI in large part on a presumption drawn from BBI's representations in its application as to one aspect of its proposed operations when the Commission had itself found BBI's representations in another aspect of its application to be unreliable. On November 13, 1970, the court below issued an opinion (WHDH Appendices, pp. 1a-43a) rejecting the arguments of Charles River and the other appellants and affirming the Commission's grant to BBI.

Petitions for rehearing were filed with the court below by WHDH and Greater Boston II. These petitions were denied on February 16, 1971 (WHDH Appendices, pp. 44a-46a).

REASONS FOR GRANTING THE WRIT

This case involves fundamental questions concerning the integrity of the decision making process of the Federal Communications Commission which have never

before been passed upon by this Court. It is particularily important that the questions raised be answered by this Court since the answers bear not only upon the decision making processes of the Federal Communications Commission, but also upon the processes of the numerous other federal administrative agencies whose jurisdictions and responsibilities pervade many facets of contemporary American life.

A.

Charles River argued in the court below that the Commission's decision granting BBI's application was procedurally defective for two reasons. First, a quorum of the Commission did not participate in the choice between Charles River and BBI. Second, even if a quorum did participate, a majority of the quorum did not join in the rationale for granting BBI's application. The essence of the two arguments is summarized below.

Section 4(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(h), provides that four Commissioners constitute a quorum. Only five Commissioners heard oral argument in this case. Chairman Hyde, who heard oral argument, abstained from voting because of his participation in phases of the proceeding which predated the comparative evaluation of applicants that was then before the Commission for review. Of the four Commissioners who participated and voted in the proceeding, three decided that the WHDH renewal application should not be granted. Commissioner Robert E. Lee dissented from this determination. Having eliminated WHDH from consideration, the Commission still was faced with the necessity of determining whether Charles River or

BBI was better qualified to operate Channel 5 in Boston. As only three of the Commissioners participated in this aspect of the case, the quorum of the Commission necessary for a legally valid choice between BBI and Charles River did not exist.

The court below recognized that the choice between Charles River and BBI was separate from the Commission's decision as to whether or not WHDH's renewal application should be granted and that only three Commissioners participated in this choice. (WHDH Appendices at 39a). Nevertheless, the court below disposed of Charles River's argument, simply by holding that "assuming a quorum of four or more" the Commission may act "by the majority vote of those present." *Id.* By *assuming* the existence of a quorum, the court below failed to address the fundamental issue posed by Charles River in its appeal, *i.e.*, whether the requisite quorum of four Commissioners can be found on the basis of mere physical presence or whether participation of four Commissioners in the deliberative process is what is required. Charles River submits that it was error for the court below to assume the existence of a quorum from the physical presence of four Commissioners, particularly in view of the fact that the court itself recognized that fewer than four of the Commissioners present actually participated in the decision.

Even assuming a valid quorum had participated in the decision, the decision to grant BBI's application should have been reversed by the court below since a majority of the assumed quorum did not agree on a rationale for the action taken. The Commission's opinion supporting the grant to BBI was joined in by only Commissioners Bartley and Wadsworth. Commissioner

Johnson issued a separate opinion in which he concurred in the result, primarily because the majority voted to deny WHDH's renewal application and because his vote was necessary for a working majority. As to the choice between BBI and Charles River, however, Commissioner Johnson stated that he felt "no passion," that a weighing of the merits of the Charles River and BBI proposals was not overwhelming and that he did not "believe the comparative hearing process an especially useful device for disposing of matters of this significance." 16 FCC 2d at 27 (WHDH Appendices at 78a). Commissioner Johnson's separate concurring opinion reveals no substantive basis to support his vote for the grant of the BBI application. On that question his concurrence was really an abstention. Thus, only two Commissioners, less than a majority of the assumed quorum, explained or justified the grant to BBI. Charles River argued in the court below that where less than a majority of a quorum of the Commission agrees on a rationale for Commission action, such action is not legally valid. *Chicago B. & Q. R. Co.* v. *United States,* 60 F.Supp. 580, 583 (E.D. Ky. 1945). Although Charles River knows of no other case explicitly reaching such a conclusion, this conclusion is implicit in other court decisions. See *e.g., Flotilla Products, Inc.* v. *FTC,* 358 F.2d 224, 230 (9th Cir. 1966) *rev'd on other grounds,* 389 U.S. 179 (1967), where the court held that the concurrence was sufficient to permit the assumption that the views of the majority opinion were substantially adopted by the concurring Commissioner, and *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission,* 124 U.S. App. D.C. 63, 361 F.2d 80 (1966), where the court rejected a challenge to a decision of the Maritime Commission on the ground that no rationale for the decision had gained

the support of a majority of the Commissioners finding that, as the concurring opinion of the Chairman did not depart from the views of the other Commissioners voting for the decision, a majority had, in fact, joined in a single, sustainable, rationale. In the instant case, Commissioner Johnson explicitly rejected the rationale of the other two Commissioners voting for BBI. Therefore, his concurrence cannot be construed, as the concurrences in the cases just referred to, as substantial adoption of the majority opinion.

The court below did not dispute Charles River's contention that no rationale for the selection of BBI instead of Charles River gained the support of a majority of the Commissioners participating in this aspect of the case. Rather, the court held that it was sufficient for Commissioner Johnson to have voted for BBI "solely in order to avoid an impassee" (WHDH Appendices at 39a). The court's holding in this regard was based upon analogy to the "accepted judicial practice for a judge to cast a vote . . . in order to avoid an impasse and secure an effective mandate for the court." (WHDH Appendices at 40a). The court's reliance upon this analogy bares the error in its holding on this aspect of the case. Administrative agencies, unlike courts, are required by statute to articulate the grounds on which their decisions are based. 5 U.S.C. § 557(c). Absent such articulation, there is no way for a reviewing court to determine whether "the grounds upon which an agency acted in exercising its powers were those upon which its action can be sustained." See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-68 (1962). Although the court below suggests (WHDH Appendices at 40a) that the defect in the

Commission's grant to BBI resulting from the failure of a majority of a quorum to join in a rationale for the grant was cured by the Commission's action on Charles River's petition for reconsideration, it is clear from a reading of the Memorandum Opinion and Order denying reconsideration that the Commission never addressed itself to this issue. 17 FCC 2d 856, 867-68 (WHDH Appendices at 316a-317a).

B.

In addition to the fundamental procedural issues discussed above which the court below failed adequately to resolve, the court's opinion also permitted a serious defect in the substantive aspects of the Commission's decision making process to remain uncorrected. In 1965 the Commission adopted its *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (WHDH Appendices, pp. 350a-372a). The *Policy Statement* was promulgated "to serve the purpose of clarity and consistency of decision" in the processes of selecting from among applicants in the broadcast services. 1 FCC 2d at 394 (WHDH Appendices at 351a). To achieve this result, the Commission set forth in the *Policy Statement* a series of basic standard comparative criteria which, under ordinary circumstances, were to be relied upon in evaluating competing applicants for broadcast facilities. Among these critera was the extent to which the owners of a station would participate full-time in a station's operation in management positions. This criterion has come to be referred to as "integration."

The importance of integration, as conceived in the *Policy Statement,* was that the extent of the participation of ownership in the day-to-day management of a

station would serve as an indicium of how an applicant might be expected to discharge its public interest obligations in the future if awarded a facility. In other words, the greater the proposed integration of ownership and management, the stronger the presumption that an applicant's programming would be attuned and responsive to the changing needs and interests of its community. Substantial integration was believed to have a direct bearing on the extent to which the Commission could rely upon an applicant to provide programming responsive to the community it sought to serve.

In granting BBI's application rather than Charles River's, the Commission relied to a great extent on the finding that BBI's integration proposal was superior to Charles River's. At the same time, however, the Commission accepted the conclusion of the Examiner that BBI's local programming proposal was so exaggerated that a suspicion had been created that the proposal had been "flashed for its supposed value in comparison." The Commission, accordingly, assessed BBI with a demerit on its programming proposal for overstating it. 16 FCC 2d at 16 (WHDH Appendices at 67a).

Charles River argued in the court below that, having found BBI's programming proposals to be so unreliable as to warrant a demerit, the Commission improperly based its preference of BBI over Charles River on a finding of superior integration, particularly where the Examiner, though not discarding BBI's representations as to integration entirely, found them to be seriously suspect. 16 FCC 2d at 245 (WHDH Appendices at 286a). The essence of Charles River's argument was that, since BBI's programming proposal had

been found to be unreliable by the Commission, such a finding pervaded every aspect of the BBI application and vitiated any preference to which BBI may otherwise have been entitled for superior integration. This conclusion is inevitable since the rationale behind integration as a comparative criterion is that it serves as an indicium of the prospects that an applicant's programming will serve the public interest. Once the reliability of an applicant's programming proposal has been found to be suspect for reasons independent of integration, integration becomes a meaningless standard for comparative evaluation. In other words, it is completely illogical to favor an applicant on the ground that its programming proposal is most likely to be effectuated in the interest of the community it proposes to serve based on its superior integration when the programming proposal itself has been found suspect.

The court below erred, therefore, in focusing in the abstract upon the Commission's finding that BBI was superior to Charles River with respect to integration. BBI's superior integration was a meaningless criterion on which to select BBI as the superior applicant once its programming proposals themselves had been found to be unreliable. By failing to reverse the Commission's decision in favor of BBI on the basis of integration where the record belied the predictive value of the integration criterion, the court below permitted the integration criterion in comparative proceedings to be transformed from a meaningful predictive standard for selection between applicants to a meaningless abstract formula, favoring, thereby, form over substance. To insure rationality in the Commission's decision making processes, this transformation must be corrected.

CONCLUSION

The petition for writ of certiorari should be granted.[3]

Respectfully submitted,

HARRY M. PLOTKIN
THOMAS SCHATTENFIELD
DAVID TILLOTSON
Counsel for Petitioner

Of Counsel:

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N. W.
1200 Federal Bar Building
Washington, D. C. 20006

May, 1971

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[3] Petitioner desires to call to the attention of the Court a development in this proceeding which, although not part of the instant record, may have a bearing on the Court's course of action. On April 21, 1971, WHDH filed with the Commission a "Petition for Further Proceedings on Application of Boston Broadcasters, Inc." requesting that the Commission seek leave of the Court to reopen the record for further evidentiary hearing on the basis of evidence uncovered by WHDH bearing on the qualifications of Boston Broadcasters, Inc. to be a licensee of the Commission. On May 6, 1971, Charles River filed comments with the Commission in support of WHDH's petition. On May 11, 1971, BBI filed an extensive opposition to the petition. The Commission has not yet acted on this matter. Should the Commission find merit in WHDH's petition as supported by Charles River's comments and seek leave to reopen the record or to take such other action as it may deem appropriate in view of the showing made to it, the Court may conclude that the appropriate disposition of the instant petition would be to return the entire cause to the Commission to permit further findings prior to final judicial resolution of the case. *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373 (1939); *Fleming* v. *F.C.C.*, 225 F.2d 523, 526 (D.C. Cir. 1955). The Court may, therefore, wish to delay disposition of the instant petition pending Commission action on the matters pending before it.